

11 USC § 544  
Collateral Security  
Negotiable Instruments  
Perfection of Security  
Interest  
Summary Judgment

In re Southern Oregon Mortgage, Inc., The Bay Company, REO  
Holding Company, Inc., Gold Key Properties, Inc., Bankr. Nos.  
689-60578 to 81 (inclusive).

Newport v. Roost, BAP No. OR-91-1589-OVAs; Adv.No. 90-6139-R

1-13-92

Per Curium

unpublished

Gold Key and the other three entities named above are related by common ownership, are all chapter 7 debtors and all cases are being jointly administered. Gold Key loaned \$36,000 to David Taylor in exchange for a note secured by a deed of trust. Appellant Hazel Newport subsequently loaned \$17,848 to gold key in exchange for a note secured by a collateral assignment of the note and deed that Taylor gave Gold key.

Roost, the trustee, commenced an adversary proceeding to avoid Newport's claim of a lien in the Taylor note and deed of trust pursuant to § 544(a)(2). The trustee claimed Newport never perfected her security interest in the Taylor note and deed of trust because she never acquired possession of those documents. Therefore the trustee's interest as a hypothetical lien creditor was superior to Newport's and thus Newport's lien should be avoided. The trustee moved for summary judgment on this issue and the bankruptcy court granted the motion.

The Bankruptcy Appellate Panel affirmed. Under Oregon law, the BAP said, a security interest in a note and deed of trust is perfected only by possession. Appellant never took possession of the note or trust deed.

Furthermore, no fact dispute could make Southern Oregon Mortgage a bailee of Newport since an entity controlled by the debtor cannot, as a matter of law, be a bailee or agent for Newport. Therefore, the court did not abuse its discretion in failing to allow additional time for Newport to produce such evidence.

NOT FOR PUBLICATION

FILED

JAN 13 1992 c.d.

NANCY B. DICKERSON, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. OR-91-1589-OVAs  
)  
SOUTHERN OREGON MORTGAGE, INC., ) BK Nos. 689-60578 to 81  
THE BAY COMPANY, an Oregon ) (inclusive)  
Corporation, REO HOLDING COMPANY, )  
INC., GOLD KEY PROPERTIES, INC., )  
)  
Debtors. ) Adv. No. 90-6139-R  
)  
HAZEL C. NEWPORT, )  
)  
Appellant, )  
)  
v. )  
)  
ERIC C. ROOST, Trustee, GOLD KEY ) MEMORANDUM  
PROPERTIES, INC., LESTER B. JONES, )  
)  
Appellees. )

Argued and Submitted on  
November 21, 1991, at Portland, Oregon

Filed - JAN 13 1992

Appeal from the United States Bankruptcy Court  
for the District of Oregon

Honorable Albert E. Radcliffe, Bankruptcy Judge, Presiding

Before: OLLASON, VOLINN, and ASHLAND, Bankruptcy Judges

E91-4A(5)

1 The bankruptcy court entered summary judgment avoiding  
2 appellant's lien pursuant to 11 U.S.C. § 544(a)(2), holding that  
3 appellant did not perfect the lien by taking possession of the  
4 security. We affirm.

5 **FACTS**

6 Gold Key Properties, Inc., loaned \$36,000 to David Taylor in  
7 exchange for a note secured by a deed of trust. The note and  
8 deed of trust were recorded in Douglas County, Oregon, that same  
9 day. Appellant Hazel Newport thereafter loaned \$17,848 to Gold  
10 Key in exchange for a note secured by a collateral assignment of  
11 the note and deed of trust that Taylor gave Gold Key. Newport  
12 recorded the collateral assignment in Douglas County.

13 The note and deed of trust in favor of Gold Key was held at  
14 all pertinent times by Southern Oregon Mortgage, Inc. Gold Key  
15 and Southern Oregon Mortgage, as well as The Bay Company and REO  
16 Holding Company, Inc., are related by common ownership. All four  
17 entities are in bankruptcy, being jointly administered.

18 On May 4, 1990, the trustee commenced an adversary  
19 proceeding to avoid Newport's claim of lien in the Taylor note  
20 and deed of trust. The adversary proceeding came before the  
21 bankruptcy court on the trustee's motion for summary judgment.  
22 The trustee contended that Newport never perfected her security  
23 interest in the Taylor note and deed of trust because she never  
24 acquired possession of those documents. Accordingly, as a  
25 hypothetical lien creditor under 11 U.S.C. §544, the trustee  
26 claimed an interest superior to Newport's.

27 Newport opposed the motion. She argued that her security  
28

1 interest in the Taylor note and deed of trust was perfected when  
2 she recorded the collateral assignment documents in the county  
3 records. Alternatively, if possession was required, she asserted  
4 a material fact dispute as to whether Southern Oregon Mortgage  
5 held the paper as her agent or bailee. She sought but was denied  
6 additional time to produce such evidence.

7 The bankruptcy court held that a collateral assignment of a  
8 note and deed of trust could not be perfected by recordation in  
9 the appropriate real property records. Instead, the court  
10 determined that the note and deed of trust are instruments which  
11 can be perfected only by possession. The court also concluded  
12 that Southern Oregon Mortgage could not have been Newport's agent  
13 or bailee because it was controlled by Gold Key. Accordingly,  
14 possession of the note and deed of trust by Oregon Mortgage did  
15 not constitute perfection by Newport. Judgment was entered  
16 summarily in favor of the trustee and Newport brought this timely  
17 appeal.

#### 18 ISSUE AND STANDARD OF REVIEW

19 The questions presented are whether a security interest in a  
20 note and deed of trust is perfected by recordation under Oregon  
21 law, and, if perfection is had only by possession, whether a fact  
22 dispute could make Southern Oregon Mortgage a bailee of Newport.

23 Questions of law and summary judgments are reviewed de novo.  
24 In re Daniels-Head & Assocs., 819 F.2d 914, 917 (9th Cir. 1987);  
25 Huber v. Standard Ins., Co., 841 F.2d 980, 983 (9th Cir. 1988).  
26 On appeal, we view the facts in a light most favorable to the  
party opposing summary judgment. Anderson v. Liberty Lobby,

1 Inc., 477 U.S. 242, 255 (1986); Martinez v. Asarco, Inc., 918  
2 F.2d 1467, 1469 n.1 (9th Cir. 1990).

### 3 DISCUSSION

4 The bankruptcy trustee, as a hypothetical lien creditor, has  
5 the power to avoid unperfected security interests under 11 U.S.C.  
6 § 544. Article 9 of the Uniform Commercial Code is codified in  
7 Oregon, as adapted, at O.R.S. §79.1010 et seq (1989). It does  
8 not apply "to the creation or transfer of an interest in or lien  
9 on real estate, including a lease or rents thereunder or a  
10 seller's or purchaser's interest in a land sale contract and the  
11 proceeds thereof." O.R.S. §79.1040(10). However, the  
12 application of Article 9 "to a security interest in a secured  
13 obligation is not affected by the fact that the obligation is  
14 itself secured by a transaction or interest to which [Article 9  
15 does] not apply." O.R.S. §79.1020(3). The note and deed of  
16 trust at issue here is a secured obligation, and Newport's lien  
17 is a security interest in a secured obligation. Accordingly, the  
18 collateral assignment at issue here is not excluded from Article  
19 9. Official comment 4 to UCC §9-102 succinctly illustrates the  
20 relevant distinction:

21 The owner of Blackacre borrows \$10,000 from his  
22 neighbor, and secures his note by a mortgage on  
23 Blackacre. This Article is not applicable to the  
24 creation of the real estate mortgage. Nor is it  
25 applicable to a sale of the note by the mortgagee, even  
26 though the mortgage continues to secure the note.  
27 However, when the mortgagee pledges the note to secure  
28 his own obligation to X, this Article applies to the  
security interest thus created, which is a security  
interest in an instrument even though the instrument is  
secured by a real estate mortgage. This Article leaves  
to other law the question of the effect on rights under  
the mortgage of delivery or non-delivery of the

1 mortgage or of recording or nonrecording of an  
assignment of the mortgagee's interest. See Section 9-  
104(j). But under Section 3-304(5) recording of the  
3 assignment does not of itself prevent X from holding  
the note in due course.

4 U.C.C. Rep. Serv. (Callaghan) ¶ 9102 at 36.

5 When assigned for collateral security, notes and deeds of  
6 trust become "instruments." In re Staff Mortgage & Investment  
7 Corp., 625 F.2d 281,283 (9th Cir. 1980) (applying California  
8 law); In re Bruce Farley Corp., 612 F.2d 1197, 1198 (9th Cir.  
9 1980) (applying California law); In re Columbia Pacific Mortgage,  
10 Inc., 22 B.R. 753 (Bankr.W.D.Wash.1982) (applying Oregon law).

11 The definition of an instrument under Oregon law includes the  
12 note that was pledged to Newport:

13 "Instrument" means a negotiable instrument . . . ,  
14 a certificated security . . . , or any other writing  
which evidences a right to the payment of money and is  
not itself a security agreement or lease and is of a  
type which is in ordinary course of business  
transferred by delivery with any necessary indorsement  
16 or assignment.

17 O.R.S. §79.1050(1)(i). O.R.S. §79.3050 provides that a "security  
18 interest in money or instruments . . . can be perfected only by  
19 the secured party's taking possession . . . . If such collateral  
20 . . . is held by a bailee, the secured party is deemed to have  
21 possession from the time the bailee receives notification of the  
22 secured party's interest."

23 Under Oregon's version of the Uniform Commercial Code, a  
24 note and deed of trust is an instrument, and a security interest  
25 in an instrument can only be perfected by possession. Newport  
26 took a security interest in an instrument, and recorded it.  
Newport never took possession of the note and deed of trust,

1 which was in the custody of Southern Oregon Mortgage at all  
2 pertinent times. As a result, her security interest was  
3 unperfected and properly avoided pursuant to 11 U.S.C. §544.

4 The bankruptcy court did not err in concluding that there  
5 were no material facts issues relative to possession by an agent  
6 or bailee. Southern Oregon Mortgage could not have been an agent  
7 or bailee for Newport as a matter of law. Neither the debtor or  
8 an entity controlled by the debtor can be a bailee. In re Bruce  
9 Farley Corp., 612 F.2d 1197, 1200 (9th Cir. 1980); O.R.S.  
10 §79.3050. If perfection by possession is to give notice of a  
11 security interest, the possession must be adverse to the debtor.  
12 That both the debtor and Oregon Mortgage were controlled by the  
13 same entity establishes unequivocally that debtor controlled  
14 Oregon Mortgage. Accordingly, the bankruptcy court did not abuse  
15 its discretion in failing to allow additional time for Newport to  
16 produce such evidence.

#### 17 CONCLUSION

18 Under Oregon law, a note and deed of trust is an instrument  
19 in which a security interest can be perfected only by possession.  
20 Newport did not take possession of the instrument at issue here,  
21 and Southern Oregon Mortgage could not, as a matter of law, be  
22 her agent or bailee. Accordingly, we must affirm.